ATTACHMENT A

AMICUS CURIAE THE STATE OF IDAHO'S PROPOSED BRIEF

IN SUPPORT OF PLAINTIFFS

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE

STATE OF MAINE, *et al.*, Plaintiffs, v. SCOTT PRUITT, in his capacity as Administrator, United States Environmental Protection Agency, *et al.*, Defendants, and HOULTON BAND OF MALISEET INDIANS, and PENOBSCOT NATION, Intervenors-Defendants.	Civil Action No.: 1:14-cv-264-JDL

***AMICUS CURIAE* THE STATE OF IDAHO'S BRIEF IN SUPPORT OF PLAINTIFFS**

The State of Idaho, as *amicus curiae*, supports Plaintiffs' ("Maine's") claims and urges this Court to grant Maine's Motion for Judgment on the Administrative Record, ECF 118 ("Motion").[1] The nationally unique relationship between the State and the Maine Tribes, anchored by Maine's undisputed statewide environmental regulatory jurisdiction, amply justifies Maine's requested relief. In addition to EPA's misinterpretation of the 1980 Acts, EPA's unlawful actions under the Clean Water Act ("CWA") have nationally significant implications for the allocation of state and federal power in setting water quality standards ("WQS"). EPA's creation of a new "sustenance fishing" designated use through a revisionary interpretation of Maine's decades-old "fishing" use effectively rezones Maine's waters, violating the

[1] Idaho adopts and incorporates into this brief Maine's Glossary of terms and conventions for citations to the Administrative Record ("AR") and Federal Register. ECF 118 at 13–16, 19 n.3. Citations to Maine's Motion herein employ the ECF pagination indicated on the top of each page.

congressionally protected "rights of the States" to "plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C. § 1251(b). Likewise, EPA's unlawful substitution of its risk management decisions for Maine's adequately protective human health criteria ("HHC") is contrary to EPA's own guidance and usurps the State's "primary responsibilities" under the CWA to "prevent, reduce, and eliminate pollution . . . ." *Id.* Federal actions with such substantial direct effects on traditional state powers and responsibilities ignore Executive Order ("EO") 13132's federalism policymaking criteria, violate the CWA's procedure for creating federal WQS, and undermine the CWA's cooperative federalism foundation. Therefore, this Court should vacate EPA's action and grant Maine's requested declaratory relief.

BACKGROUND

The EPA action under review here is but one rendition of a script playing out in several states across the country. In Maine and Washington (and perhaps soon in Idaho),[2] EPA has utilized the same convoluted rationale to achieve the same unlawful result—more stringent HHC for waters EPA deems subject to its new tribal "sustenance fishing" or "subsistence fishing" designated use. EPA claims this is required by the "unique situation" in each state. AR 5337 (Maine); 81 Fed. Reg. 85417, 85424 (Nov. 28, 2016) (Washington); Ex. 1 at 4 n.7 (Idaho). But the common elements of this nationwide effort are unmistakable:

[2] For illustrative purposes, Exhibit 1 to this brief is a letter sent by the outgoing EPA Region 10 Administrator on January 19, 2017—during the final hours of the Obama administration—to the Director of the Idaho Department of Environmental Quality. The letter announces EPA's "preliminary review" of Idaho's December 13, 2016 HHC submittal, including a lengthy supporting analysis of "key concerns" that is virtually indistinguishable from the rationale for EPA's actions disapproving state HHC and subsequently imposing federal HHC in Maine and Washington. *Compare* Ex. 1 *with* AR 5297–5353 (Maine) *and* 81 Fed. Reg. 85417, 85422–26 & n.32–39 (Nov. 28, 2016) (Washington). Thus, the letter illustrates not only Idaho's interest in this litigation, but also EPA's nationwide "analytical framework" for applying its new theory of tribal fishing rights to state HHC submittals. Citations to Exhibit 1 utilize the pagination of the PDF document as a whole, not the bifurcated pagination of the letter and enclosure.

- EPA claims "unique" circumstances in each State require it to "harmonize" its conception of local tribal fishing rights with the CWA. AR 5304, 5333–34; 81 Fed. Reg. 85422–23; Ex. 1 at 4.

- To achieve "harmony," EPA unlawfully interprets each state's longstanding, EPA-approved designated fishing use as "sustenance fishing" or "subsistence fishing." AR 5332 ("EPA is interpreting the designated fishing use for all [Maine] waters in Indian lands to mean 'sustenance fishing'; and for certain waters in the Southern Tribes reservations, EPA is also approving a sustenance fishing designated use specified in MIA."); 81 Fed. Reg. 85424 ("EPA has interpreted the [Washington's] EPA-approved designated fish and shellfish harvesting use to include or encompass a subsistence fishing component . . . ."), n.21 ("The term "subsistence" is coterminous with "sustenance" in this context [of tribal fishing rights]."); Ex. 1 at 4 (EPA believes Idaho's EPA-approved recreation use, which includes fishing, "should be interpreted to include a subsistence fishing component.").

- EPA leverages its unlawful interpretation of the States' fishing use to claim, without authority and contrary to its own guidance, that tribal fish consumers must be considered the "target general population," as opposed to a high-consuming subpopulation, for purposes of deriving HHC. AR 5338, 5340; 81 Fed. Reg. 85424–25; Ex. 1 at 4.

- EPA disregards the States' scientifically sound data on actual fish consumption rates ("FCRs") due to an alleged failure to address "unsuppressed" tribal fish consumption, a requirement found nowhere in the CWA or any of its implementing regulations. AR 5339–41; Ex. 1 at 5–6 ("[T]he selected FCR must represent a current unsuppressed value."); *but see* 81 Fed. Reg. 85426 (adopting 175 g/day FCR as "acceptable" to Washington tribes despite admitting "no survey is a clear representation of current unsuppressed consumption for all tribes in Washington.").

The result in Maine and Washington has been federal HHC premised on "sustenance" or "subsistence" fishing uses found nowhere in state law and on federal policies found nowhere in the CWA or its implementing regulations. Nevertheless, the agency claims these actions "do[] not have federalism implications." 81 Fed. Reg. at 85435 (Washington), 92487 (Maine).

ARGUMENT

Against this backdrop, EPA's action evidences an effort to conform Maine law to the mold of a nationwide policy push. *See* ECF 118 at 45–49 (noting that EPA's 2014 reaffirmation of its tribal policy coincided with its new approach to state HHC); *see also* Ex. 1 at 2 (voicing EPA's desire that Idaho "be in alignment" with EPA and tribal governments). Far from

exemplifying careful attention to Maine's distinctive state-tribal relationship, EPA's action here arbitrarily works backward from its preordained result. This top-down approach is anathema to the federalism policymaking criteria expressed in EO 13132 and the cooperative foundation of the CWA—the cornerstone of which is the states' paramount authority to designate and protect the uses of their waters. Further, the challenged action exceeds EPA's authority under the CWA, which, in the context of HHC, is limited to determining that a state's criteria are grounded in sound science and protect designated uses. 40 C.F.R. §§ 131.21(b), 131.5(a)(1)–(2). Where, as here, the state adopts adequately protective and scientifically valid criteria, EPA's limited role provides no room for second-guessing the risk management decisions inherent therein. For these reasons, in addition to EPA's erroneous application of the 1980 Acts, Maine is entitled to declaratory relief.

1. Federalism principles limit EPA's authority under the CWA.

Authority from all three branches of government makes federalism a key sideboard on federal action under the CWA. First, the CWA's text, structure, and history evidences Congress's intent to vest states with primary authority and policy discretion over WQS. In the debate on the Water Quality Act of 1965, a precursor to the CWA, Congress considered making the establishment of WQS an exclusively federal responsibility. H. Rep. 89-215 (1965), *reprinted in* 1965 U.S. C.C.A.N. 3313, 3320–23. Exclusive federal control was rejected, however, because it "would place in the hands of a single Federal official the power to establish zoning measures over—to control the use of—land within watershed areas in all parts of the United States." *Id.* at 3322. Instead, Congress chose to condition federal funding on each state's commitment to establish WQS. *Id.* at 3321–23. A few years later, Congress enacted the Federal Water Pollution Control Act amendments of 1972, which shifted the national policy focus from

the ambient water quality to controlling point source discharges. Despite this shift and the absence of WQS provisions in the initial Senate bill, Congress ultimately decided to continue the WQS program along with the expectation that standard-setting would largely be a state responsibility. S. Conf. Rep. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3800. That legislation resulted in the process for adopting and revising WQS codified in 33 U.S.C. § 1313. Pub. L. No. 92-500, § 303, 86 Stat. 816, 846–48 (1972).

When a state chooses to adopt or revise its WQS, Congress directed that the resulting standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). Congress also specified that WQS should "protect the public health and welfare, enhance the quality of water and serve the purposes of this chapter," *id.*, reaffirming the core state rights and responsibilities set forth in the CWA's opening section. *See id.* § 1251(b) ("recognize[ing], preserv[ing], and protect[ing] the primary rights and responsibilities of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including the restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority . . . ."). Further, Congress erected several procedural barriers to the establishment of federal WQS. Before EPA may promulgate federal WQS for a state, there must be either (1) a state failure to establish WQS "consistent with" applicable minimum requirements, or (2) a finding by the EPA Administrator that a federal standard is "necessary" to meet applicable minimum requirements. *Id.* § 1313(c)(3)–(4). The CWA's text and structure, as well as its legislative history, thus evinces a finely tuned balance of federal-state power in designating and

protecting the uses of state waters, tasks Congress recognized as coextensive with the states' zoning and police powers.[3]

The Executive Branch's self-imposed federalism policymaking criteria likewise evidence a broad goal of maximizing state autonomy and discretion in joint state-federal undertakings. Issued by President Clinton, EO 13132 sets out "fundamental federalism principles," including:

> (i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.

64 Fed. Reg. 43255, 43256 (Aug. 4, 1999). The Order further directs federal agencies, including EPA, to follow federalism policymaking criteria and meaningfully consult with states while developing and before implementing policies with "federalism implications." *Id.* Among the policymaking criteria are directives to "grant the States the maximum administrative discretion possible" where the states administer federal statutes such as the CWA, and to "defer to the States to establish standards." *Id.* EPA echoes these criteria in its recently released *FY 2018-2022 Strategic Plan*,[4] a primary goal of which is "[r]ebalanc[ing] the power between Washington and the states" by, among other things, "maximiz[ing] the flexibilities provided by law to take each state's unique situation into account when making regulatory and policy decisions." Recent rhetoric notwithstanding, EPA claims its action here—including its new interpretations of the 1980 Acts and Maine's fishing use, substitution of its preferred "target general population," and insistence on an "unsuppressed" FCR—simply "does not have federalism implications." 81 Fed.

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[3] As discussed in Maine's Motion, Congress struck a similar balance in confirming and ratifying Maine's statewide environmental regulatory jurisdiction under the 1980 Acts. ECF No. 118 at 22–28. The federalism canon is equally, if not more, applicable to EPA's construction of the 1980 Acts, as the agency has no role in administering those statutes and therefore receives no deference in its interpretation. *Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007).

[4] Available at: https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf

Reg. at 92487; *see also* 81 Fed. Reg. at 85434 (same for Washington). Fortunately, the agency's *ipse dixit* does not resolve the matter.

When the Executive Branch fails to heed its internal limits, the judiciary has an essential role in maintaining the federal-state balance Congress established in the CWA. For example, in two cases addressing the jurisdictional scope of the CWA, the Supreme Court refused to accept administrative interpretations that would have expanded federal authority over intrastate water features. In considering whether the Army Corps of Engineers' "waters of the United States" jurisdiction extended to an isolated, intrastate pond occasionally used by migrating birds, the Court expressed "heightened" concern "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of Northern Cook County* ("*SWANCC*") *v. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). Because the Corps' expansive view of its jurisdiction would "result in significant impingement of the States' traditional and primary power over land and water use," the Court looked for a "clear statement" in the CWA that Congress intended to "readjust the federal-state balance." *Id.* at 174. Finding none, the Court rejected the Corps' interpretation. *Id.* Five years later, a plurality of Justices rejected yet another expansive federal interpretation of "waters of the United States," again emphasizing the absence of a "clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (Scalia, J., plurality op.). Casting the decisive fifth vote against the interpretation, Justice Kennedy also took care to ensure his rationale, though divergent from the plurality's, would likewise "raise no serious constitutional or federalism difficulty." *Id.* at 782 (Kennedy, J., concurring in the judgment).

Known as the "federalism canon," this mode of statutory analysis favors a construction that maintains the existing balance of federal-state power unless Congress clearly expressed its intent to alter that balance. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 301–02 (3d Cir. 2015).This case is uniquely suited for application of the federalism canon—particularly because EPA gave such cursory attention to the federalism implications of its action. Had EPA taken a hard look, it would have been forced to grapple with the fact that there is no "clear statement" from Congress authorizing EPA to "readjust" the federal-state balance in the manner under review here. *SWANCC*, 531 F.3d at 174. Specifically, nothing in the CWA allows EPA to create a federal use designation merely by announcing (over a state's objections) a new interpretation of state law. Nor does the Act allow EPA to leverage that interpretation as a basis for rejecting a state's risk management decisions. Therefore, this Court should conclude "Congress delegated some authority over the definitions of technical terms in the Clean Water Act but not so much discretion as to usurp states' zoning powers." *Farm Bureau*, 792 F.3d at 302.

2. EPA lacks authority to create a new designated use through an after-the-fact interpretation of state law.

Idaho, like Maine, is deeply concerned that, "[i]f upheld, EPA's new method of using an after-the-fact 'interpretation' to alter existing WQS under state law would also set an arbitrary and unlawful precedent by allowing EPA to re-write state law and ignore CWA requirements in order to impose new or altered WQS at its whim." ECF 118 at 56. The essential premise of EPA's action is that Maine designated a "sustenance fishing" use in unspecified Indian Waters. Yet Maine's Water Program—which EPA approved as "in compliance" with the CWA decades ago, AR 423–24—contains no such designated use. Since 1986, Maine has statutorily designated "fishing" as one use of its waters, 38 M.R.S. §§ 465 to 465-B, and, in 2002, the Maine Legislature refused to designate a "subsistence fishing" use even for a limited portion of one

river. ECF 118 at 36 (discussing L.D. 1529). In short, Maine has never adopted, and thus does not have, a "sustenance fishing" use.

EPA's action, however, achieves precisely the opposite by interpreting "fishing" as "sustenance fishing." AR 5304. Because this interpretation effectively rezones an ill-defined swath of Maine waters, it constitutes either a revision of Maine's "fishing" use or the creation of an entirely new use. Indeed, this fits EPA's own definition of a new or revised WQS. AR 1563–66 (explaining that a new or revised WQS is, *inter alia*, any (1) "legally binding" provision that (2) "address[es] designated uses" by (3) "express[ing] or establish[ing] the desired condition" of waters of the United States and that (4) "has the effect of changing an existing WQS").

Congress did not intend such drastic changes to be accomplished through mere administrative interpretation. As noted, EPA may issue new or revised federal WQS—including new or revised use designations—in only two circumstances: (1) when state-submitted WQS are not "consistent with" applicable minimum requirements, or (2) when the EPA Administrator determines it is "necessary to meet the requirements" of the CWA. 33 U.S.C. § 1313(c)(4). While EPA's regional administrators may act in the former circumstance, the Administrator has retained sole authority to act in the latter. 40 C.F.R. § 131.22(a)–(b). Either way, EPA is subject to the "same policies, procedures, analyses, and public participation requirements established for the States," which include notice-and-comment rulemaking *before* establishing a new or revised federal designated use. *Id.* § 131.22(c); *see also id.* § 131.20 (establishing procedures for state review and revision of WQS). Here, Maine clearly did not submit EPA's "sustenance fishing" interpretation, the EPA Administrator did not determine such an interpretation was necessary,[5] and, in any event, EPA undertook no rulemaking to designate a federal "sustenance fishing" use

[5] As Maine notes, it is difficult to conceive any necessity for a federally designated "fishing" use where, as here, EPA long ago approved the State's designated uses as consistent with the CWA's "fishable" and "swimmable" goals. ECF 118 at 56 n.45.

before it began enforcing that use in Maine. Therefore, EPA's unlawful designation must be vacated and cannot be used to bootstrap EPA's analysis of Maine's HHC.

More fundamentally, an interpretation of the CWA that would allow for such designation-by-interpretation threatens the Act's federal-state balance. "[T]he specification of a waterway as one for fishing, swimming, or public water supply is closely tied to the zoning power Congress wanted left to the states." *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980). That power is an illusion if EPA can impose a federal use on state waters through the simple expedient of an interpretation— particularly where, as here, EPA's interpretation depends upon a misreading of state law (i.e. the 1980 Acts) "not within [EPA's] purview." *Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007). Moreover, EPA's approach, if upheld, could permanently degrade the states' authority to decide the uses of their waters because it would impose a heretofore-rejected "comprehensive environmental servitude" wherever EPA deems tribal fishing, and perhaps other, rights applicable. *United States v. Washington*, 694 F.2d 1374, 1380–1388 (9th Cir. 1982) (rejecting a treaty-based environmental servitude as unsupported by precedent, unnecessary, unworkable, and disproportionately disruptive), *vacated on reh'g,* 759 F.2d at 1354–55 (but reaching same result).

Given the troubling implications, EPA's action in Maine should not be allowed to take root as precedent for the rest of the Nation. Congress defined two circumstances in which EPA has the authority to impose federal WQS. Because neither circumstance exists in Maine, EPA's designation of a "sustenance fishing" use exceeds its CWA authority and must be rejected.

3. EPA lacks authority to substitute its risk management preferences for those underlying Maine's scientifically sound and protective HHC.

Without a "sustenance fishing" designation, EPA has no legal basis for disapproving Maine's HHC for an alleged failure to "adequately protect that sustenance fishing use." AR

5304. Instead, the question is whether Maine's HHC are scientifically sound and adequately protective of Maine's statewide designated uses, including "fishing." 40 C.F.R. § 131.11(a)(1). This inquiry need not detain the Court long because EPA has already approved Maine's HHC under that standard. AR 5335–36; *see also* ECF 45-1 (approving certain Maine HHC for Indian Waters because EPA's were "the same or less stringent").

Under EPA's 2000 Guidance, HHC are derived from a mix of three related factors: toxicity/cancer potency, exposure, and risk management decisions. AR 869–70. EPA's action here focuses on risk management decisions—selection of FCR and target population—that it acknowledges "are, in many cases, better made at the State or Tribal level" because such decisions involve "balancing risk benefits." 65 Fed. Reg. 66444, 66448, 66468 (Nov. 3, 2000). The 2000 Guidance could not be more explicit: "The choice of default fish consumption rates for protection of a certain percentage (i.e., the 90th percentile) of the general population *is clearly a risk management decision*." AR 869 (emphasis added). Of course, not all members of a state's population consume fish at an identical rate; rather, there is a distribution of FCRs across the population. The 2000 Guidance recognizes this and leaves states "flexibility" to decide how best to ensure adequate protection for individuals at the high-consuming end of the distribution. AR 880; *see also* AR 5337 ("[S]tates have some flexibility in determining which populations the state's criteria are designed to protect."). Thus, states may, but are not required to, "target" a particular subgroup when establishing HHC. Otherwise, the states' option to adopt criteria "based on" EPA's CWA § 304(a) Guidance—which is calibrated to "EPA's goal" of protecting "the majority of the population," AR 875–76—would be meaningless. 40 C.F.R. § 131.11(b)(1) (providing three options for states to adopt numeric criteria such as HHC).

Using its flexibility under the 2000 Guidance, Maine based its HHC on local fish consumption data drawn from a survey of Maine anglers (many of whom are Native American). AR 5339–40. By targeting its FCR inquiry on a subpopulation that consumes more fish, Maine made a conservative risk management choice. Maine reinforced that choice with a 10^{-6} risk level, thereby ensuring that individuals consuming up to 3,240 grams (over 7 pounds) of fish per day—more than double the "unsuppressed," "heritage" rates identified in the Wabanaki Study, AR 5344—are still protected at an acceptable 10^{-4} level.[6] *See* AR 881 (explaining that a particular risk level is relative to exposure parameters such as FCR). It also bears emphasis that the methodology promoted in the 2000 Guidance and employed by Maine is replete with highly conservative exposure assumptions that are unaffected by Maine's (or EPA's) risk management choices. For instance, the methodology's exposure scenario assumes a hypothetical individual who consumes contaminated fish and/or surface water at the same rate every day over a 70-year lifetime. AR 3499–500 (discussing HHC "default exposure assumption"). Thus, the HHC EPA approved for Maine's non-Indian Waters are premised on a highly protective 10^{-6} risk level and the fish consumption of a highly exposed local subpopulation, not to mention the many conservative exposure assumptions built into EPA's preferred methodology. Lacking a legal basis for treating Indian Waters differently, EPA also has no basis for demanding Maine "target" tribal populations, account for an unquantifiable "suppression" effect, or make any other change to the risk management decisions underlying its EPA-approved, statewide HHC.

CONCLUSION

This Court should vacate EPA's action and grant Maine's requested declaratory relief.

[6] EPA's position is that a 10^{-4} level of increased lifetime cancer risk (i.e., 1 in 10,000) is adequately protective albeit at the low end of "generally acceptable levels." 55 Fed. Reg. 8666, 8716 (Mar. 8, 1990); *see also Ohio v. EPA*, 997 F.2d 1520 (D.C. Cir. 1993) (upholding EPA's use of a cancer risk range between 10^{-4} to 10^{-6} as adequately protective for purposes of hazardous waste cleanups).

Respectfully submitted this 2d day of March, 2018.

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